

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

FILED

FEB 7 2005

UNITED STATES OF AMERICA,

Plaintiff,

**U.S. DISTRICT COURT
CLARKSBURG, WV 26301**

v.

Criminal No. 1:05 CR 04

DANIEL WILSON TESTERMAN,

Defendant.

MOTION TO SUPPRESS

NOW COMES the Defendant, **DANIEL WILSON TESTERMAN**, by and through his attorney, **GEORGE J. COSENZA**, and moves the Court, pursuant to Rules 12 and 41 of the Federal Rules of Criminal Procedure, to suppress the introduction into evidence, for any purposes, all of the evidence and the fruits therefrom seized from the Defendant's home pursuant to that certain search warrant dated August 27, 2003 (hereinafter referred to as Search Warrant I) on the following grounds:

1. The affidavit in support of the issuance of the search warrant does not establish probable cause or sufficient grounds for the issuance of said warrant.

The affidavit executed by Chief Ritchie County Deputy M. D. Kelly, in support of the search warrant, alleges that Amy Workman received several obscene photographs by e-mail and that she recognized the person depicted in the e-mails as the Defendant. The affidavit does not set forth the nature of the photographs or how they were obscene. It fails to state the date the e-mails were sent or received. It fails to state where the e-mails originated or that they were sent from a computer located in the Defendant's home. Finally, the allegations in the affidavit do not support that a crime had been committed to-wit: (a) West Virginia Code 61-3C-14(a)(1) does not exist and

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(b) West Virginia Code 61-3C-14a(a)(1) makes it unlawful for any person with the intent to harass or abuse another person to use a computer to make contact with another without disclosing his or her identity. The affidavit acknowledges that Amy Workman knew the identity of the person in the photographs.

2. The law enforcement officers conducting the search seized property not authorized by the warrant.

The search warrant only authorized officers to seize records contained within any personal computer's hard drive and memory as well as all software which may have been used in connection with and to facilitate the above crimes.

None of the property seized pursuant to the warrant (see property receipt) fit the description contained therein, except the eight (8) - 3-1/2" diskettes.

The Defendant further moves the Court to suppress the introduction into evidence, for any purposes, all of the evidence and the fruits therefrom seized from the Defendant's home pursuant to that certain search warrant dated August 29, 2003 on the following grounds:

1. The search warrant fails to describe the place to be searched.
2. The affidavit used to support the issuance of the above-cited search warrant is based upon the issuance of a previous search warrant (Search Warrant I) which was in violation of West Virginia law.

The Defendant further moves the Court to suppress the introduction into evidence, for any purposes, all of the evidence and the fruits therefrom seized from the Defendant's home pursuant to that second certain search warrant dated August 29, 2003 on the following grounds:

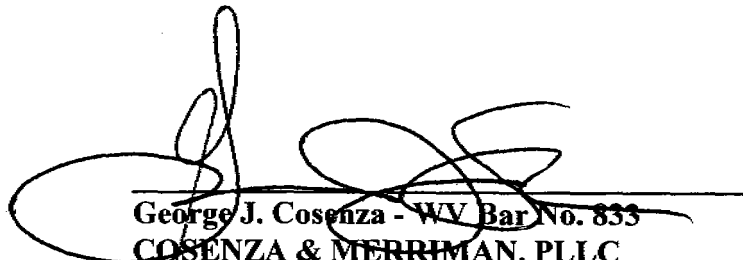
1. The affidavit used to support the issuance of the above-cited search warrant is based upon the issuance of a previous search warrant (Search Warrant I) which was in violation of West

Virginia law.

2. The search warrant only authorized the seizure of a computer not a "bedding light in color with tan or yellow cartoon animals, believed to be a lion".

See attached Memorandum of Law in support of Defendant's Motion.

Dated this 4th day of February, 2005.



George J. Cosenza - WV Bar No. 833
COSENZA & MERRIMAN, PLLC
515 Market Street - P.O. Box 4
Parkersburg, WV 26102
(304) 485-0990
Counsel for Defendant

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

Criminal No. 1:05 CR 04

DANIEL WILSON TESTERMAN,

Defendant.

**MEMORANDUM IN SUPPORT OF DEFENDANT,
DANIEL WILSON TESTERMAN'S, MOTION TO SUPPRESS**

FACTS

On January 5, 2005, the Defendant, Daniel Wilson Testerman, was charged in a four count indictment with knowingly possessing and receiving child pornography in violation of 18 U.S.C. §2252A(a)(5)(B) and 18 U.S.C. §2252A(a)(2)(A)¹. The Defendant, at all times hereto, has been a resident of Ritchie County, West Virginia.

On August 27, 2003, a search warrant was issued by Ritchie County Magistrate David Wayne Haugh. A copy of said search warrant and accompanying affidavit is attached hereto, marked Exhibit "A", and incorporated herein by reference. The affidavit authored by Chief Deputy M. D. Kelly alleged that a crime had been committed because of the transmission of obscene

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The Defendant was previously charged by indictment in the Circuit Court of Ritchie County, West Virginia, with one (1) count of sexual assault in the first degree, one (2) count of sexual abuse by a parent, guardian or custodian, one (1) count of incest, one (1) count of obscene, anonymous, harassing and threatening communications by computer, and one hundred seventy two (172) counts of possessing material depicting minors in sexually implicit conduct. The sexual assault and incest counts were severed from the indictment. The Defendant first proceeded to trial on the remaining one hundred seventy-three counts. A mistrial was declared by the court after the opening statement by the prosecution. The entire indictment was subsequently dismissed in favor of the federal indictment returned in this matter.

material by computer to Amy Workman with the intent to harass or abuse said individual and sought the seizure of any and all records contained within any personal computers, hard drive and memory as well as all software which may have been used in connection with said crime. The sole basis in the affidavit to establish probable cause for the issuance of the warrant was that "Amy Workman received several obscene photographs by e-mail. She recognized the person depicted in said obscene photographs as being Daniel Testerman."

Based upon the affidavit, the Magistrate issued the search warrant causing law enforcement officers to seize the property detailed on the property receipt attached hereto, marked Exhibit "B", and incorporated herein by reference.

On August 29, 2003, another application for a search warrant was made by Chief Deputy Kelly. It appears that while reviewing the material on the computer that had been seized pursuant to the previous search warrant (Exhibit "A"), the police found images they believed to be Amy Workman's three year old daughter engaging in sexual activity with an adult male. The warrant and affidavit are attached hereto as Exhibit "C", and incorporated herein by reference. Pursuant to said arrest, the police seized property (which was already in their possession by virtue of the first search warrant) listed on the property receipt, attached hereto, marked Exhibit "D", and incorporated herein by reference.

Later on August 29, 2003, another application for a search warrant was made by Chief Deputy Kelly. Again during the time that law enforcement was viewing the material on the computer seized pursuant to the first search warrant (Exhibit "A"), they identified Ms. Workman's three year old daughter, A.D.W., "as one of the images depicted on the computer engaged in sexual activity with an adult male lying on bedding light in color with tan or yellow cartoon animals,

believed to be a lion". Based upon Chief Deputy Kelly's affidavit, a search warrant was issued by Ritchie County Magistrate Teresa P. Harper authorizing the State of West Virginia to "search forthwith the computer above described and all appurtenances appertaining thereto for the property above specified, to seize such property and bring same before me to be dealt with according to law". A copy of the affidavit and search warrant are attached hereto, marked Exhibit "E", and incorporated herein by reference. A copy of the property receipt is attached hereto, marked Exhibit "F", and incorporated herein by reference.

The Defendant seeks to suppress all of the evidence seized and the fruits therefrom pursuant to the search warrants issued by the Ritchie County Magistrate Court.

STANDARD OF REVIEW

The validity of a search warrant obtained by state offices is to be tested by the requirements of the Fourth Amendment of the U.S. Constitution, not by state law standards, when the admissibility of evidence in federal court is at issue. *United States v. Clyburn*, 24 F.3d 613 (4th Cir. 1994).

DISCUSSION OF LAW

The Fourth Amendment of the U.S. Constitution requires that search warrants (1) be issued by a neutral and detached magistrate, (2) be based upon probable cause supported by oath, and (3) contain a particular description of the place to be searched and the things to be seized. *United States v. Clutchette*, 24 F.3d 577 (4th Cir. 1994); *Dalia v. United States*, 441 U.S. 238, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979).

Probable cause is 'a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat seat of legal rules.' *Illinois v.*

Gates, 462 U.S. 213, 232, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983). It ‘depends on the totality of the circumstances’, *Maryland v. Pringle*, 540 U.S. 366, ----, 124 S. Ct. 795, 800, 157 L.Ed. 2d 769 (2003), and exists (in the context of a search) ‘where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.’ *Ornelas v. United States*, 517 U.S. 690, 696, 16 S.Ct. 1657, 134 L.Ed.2d 91 (1996). The probable cause standard does not ‘require officials to possess an airtight case before taking action. The pieces of an investigative puzzle will often fail to neatly fit, and officers must be given leeway to draw reasonable conclusions from confusing and contradictory information.’ *Taylor v. Farmer*, 13 F.3d 117, 121 (4th Cir. 1993).

The Supreme Court has cautioned that questions of reasonableness under the Fourth Amendment must be decided on the facts and circumstances of each case, and that seldom will one determination be a useful precedent for another. See *Ornelas v. United States*, *supra*.

Although ‘[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, the Supreme Court adopted the exclusionary rule ‘to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.’ *United States v. Calandra*, 414 U.S. 338, 347, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). Generally, the exclusionary rule provides that ‘evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceedings against the victim of the illegal search and seizure,’ *id.*, and it ‘reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or “fruit of the poisonous tree.”’ *Segura v. United States*, 468 U.S. 796, 804, 104 S.Ct. 3380, 82 L.Ed. 2d 599 (1984)

The affidavit in support of the issuance of the August 27, 2003 search warrant (Exhibit "A") does not establish sufficient probable cause as required by federal law. The affidavit begins by alleging that a crime has been committed, i.e., a violation of West Virginia Code §61-3C-14(a)(1)²;

(a) It is unlawful for any person, with the intent to harass or abuse another person, to use a computer to:

(1) make contact with another without disclosing his or her identity with the intent to harass or abuse;

The issue of transmitting obscene material is not addressed until later in the statute in subparagraph (4):

(4) Cause obscene material to be delivered or transmitted to a specific person after being requested to desist from sending such material.

Obscene material is defined in the statute as follows:

For purposes of this section, 'obscene material' means material that:

(A) An average person, applying contemporary adult community standards, would find, taken as a whole, appeals to the prurient interest, is intended to appeal to the prurient interest, or is pandered to a prurient interest;

(B) An average person, applying contemporary adult community standards, would find depicts or describes, in a patently offensive way, sexually explicit conduct consisting of an ultimate sexual act, normal or perverted, actual or simulated, an excretory function, masturbation, lewd exhibition of the genitals, or sadomasochistic sexual abuse; and

(C) A reasonable person would find, taken as a whole, lacks literary, artistic, political or scientific value.

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The actual West Virginia statute is 61-3C-14a; entitled Obscene, Anonymous, Harassing and Threatening Communications by Computer.

Chief Deputy Kelly's affidavit states that the aforementioned statute was violated because "Amy Workman received several obscene photographs by e-mail" and "she recognized the person depicted in said obscene photographs as being Daniel Testerman".

The photographs in question were never shown to the magistrate to determine whether they met the definition of obscenity required by the statute. Amy Workman never appeared before the magistrate to testify or provided an affidavit regarding the photographs. In addition, the affidavit is silent as to the nature of the photographs and how they were obscene and when they were transmitted. Finally, there is no allegation or information provided the magistrate that Ms. Workman was harassed or abused by the photograph or that she had requested Mr. Testerman to desist from sending such material.³

The law is clear that the sufficiency of the affidavit to support the issuance of a search warrant is limited to the affidavit itself when no other information is presented to the magistrate. *Whitley v. Warden*, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971).

The hearsay information presented to the magistrate in Chief Deputy Kelly's affidavit was conclusory, i.e., that the photos sent to Ms. Workman were obscene. Such language is not sufficient to establish the requisite probable cause to issue a search warrant. *Nathanson v. United States*, 290 U.S. 41, 54 S.Ct. 1, 78 L.Ed. 2d 159 (1933). As the Supreme Court in *Illinois v. Gates*, *supra*, stated:

As in *Nathanson*, this is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause. Sufficient information must be presented to a magistrate to allow that officials to determine probable cause; his

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The photographs are of a nude male shown from the neck down and are not photographs of Mr. Testerman.

action cannot be a mere ratification of the conclusions of others. In order to insure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued.

Based upon the foregoing, the evidence and the results therefrom seized by virtue of said search warrant (Exhibit "A") must be excluded from being used as evidence in the trial of the above-cited matter.

II

The Defendant will now address the August 29, 2003 search warrant, attached hereto Exhibit "C". The necessity for this warrant was the result of the seizure of the computer and other items from the Testerman home pursuant to the August 27, 2003 warrant hereinbefore addressed.⁴ Its basis was the apparent discovery of an image of a child identified as Amy Workman's daughter engaged in sexual activity with an adult male. Neither the affidavit nor the search warrant contain a particular description of the place to be searched.

It is the requirement of the Fourth Amendment that a search warrant contain a description of the place to be searched. The test for determining the sufficiency of the description of the place to be searched is whether the place to be searched is described with sufficient particularity as to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premises might be mistakenly searched. *Steele v. United States*, 267 U.S. 498, 45 S.Ct. 414 (1925). Requiring particularity in a search warrant serves the important function of preventing general searches and affording written assurance to the

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To the extent the issuance of this search warrant relies upon information contained in the affidavit of the August 27, 2003 search warrant, the Defendant reiterates his argument relating to same as support for the suppression of the warrant addressed herein.

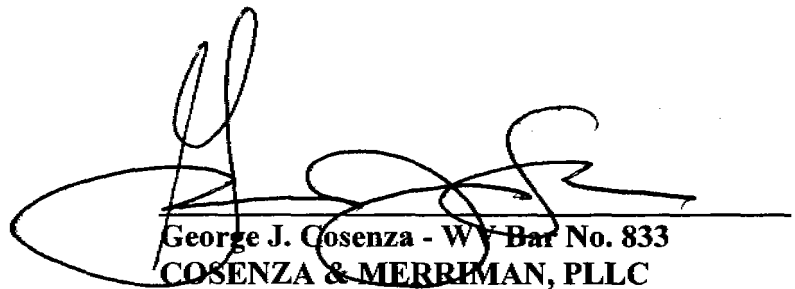
individual whose property is searched or seized of the lawful authority of the executing officer, his need to search and the limits of his power to search. *Owens ex rel. Owens v. Cott*, 372 F.2d 267 (4th Cir. 2004).

In the case at bar, there was no description in the search warrant as to the place to be searched rendering the warrant invalid.

III

The last argument addresses the second search warrant issued on August 29, 2003 attached hereto as Exhibit "E".⁵ Here, the purpose of the affidavit was to allow the seizure of "bedding light in color with tan or yellow cartoon animals believed to be a lion". The search warrant issued pursuant to said affidavit only allowed the seizure of a computer. A search warrant was never issued allowing the seizure of the bedding and therefore it should be excluded for use of evidence at trial.

Dated this 4th day of February, 2005.



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(304) 485-0990
Counsel for Defendant

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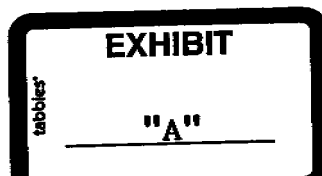
Again, to the extent this warrant was issued in reliance of the affidavit supporting the search warrant issued on August 27, 2003, the Defendant reiterates the argument by reference to Section I herein.

AFFIDAVIT AND COMPLAINT FOR SEARCH WARRANT

STATE OF WEST VIRGINIA,
COUNTY OF RITCHIE, TO-WIT:

This day personally appeared before the undersigned, a Magistrate for said county, CHIEF DEPUTY M. D. KELLY, who, after being first duly sworn, upon his oath says:

That on the ____ day of December, 2002, and prior to the making of this Complaint, in the said County of Ritchie, DANIEL TESTERMAN, did unlawfully, with intent to harass or abuse AMY WORKMAN, by using a computer to make contact with the said AMY WORKMAN, without disclosing his identity causing obscene material to be delivered or transmitted in violation of WVa Code 61-3C-14(a)(1), and that the affiant has cause to believe and does believe that property, designed and intended for use which is and has been used as a means of committing such criminal offense, kept, concealed, possessed, designed and intended for use which is and has been used in violation of the criminal laws of the State as evidence of a crime, namely, any and all records contained within any personal computer's hard drive and memory as well as all software which may have been used in connection with and to facilitate the above crimes is concealed in the residence of DANIEL TESTERMAN and MISSY TESTERMAN located at Route 1, Box 136B,



Washburn Street, Harrisville, WV 26362, being a one story, vinyl sided home, yellow in color, with attached garage and that the facts for such belief are that AMY WORKMAN received several obscene photographs by e-mail. She recognized the person depicted in said obscene photographs as being DANIEL TESTERMAN.

Chief Deputy M. D. Kelly
CHIEF DEPUTY M. D. KELLY
COMPLAINANT

Taken, subscribed and sworn to before me this the 27 day of August, 2003.

David Wayne Haugh
DAVID WAYNE HAUGH
MAGISTRATE

NOTE: W.Va. Code §62-1A-4 provides specifically that a warrant may be executed and returned only within 10 days after its date.

SEARCH WARRANT

STATE OF WEST VIRGINIA,

COUNTY OF RITCHIE, TO-WIT:

TO THE SHERIFF OR ANY DEPUTY SHERIFF OF THE COUNTY, TO ANY MEMBER OF THE DEPARTMENT OF PUBLIC SAFETY, OR TO ANY POLICE OFFICER AUTHORIZED BY LAW TO EXECUTE SEARCH WARRANTS.

Whereas, CHIEF DEPUTY M. D. KELLY, has this day made complaint on oath before the undersigned, Magistrate of Ritchie County, West Virginia, that on the ____ day of December, 2002, and prior to the issuance of this warrant, in the said County of Ritchie, DANIEL TESTERMAN, did unlawfully with intent to harass or abuse AMY WORKMAN, by using a computer to make contact with the said AMY WORKMAN, without disclosing his identity causing obscene material to be delivered or transmitted in violation of WVa Code 61-3C-14(a)(1), and that the affiant has cause to believe and does believe that property, designed and intended for use which is and has been used as a means of committing such criminal offense, kept, concealed, possessed, designed and intended for use which is and has been used in violation of the criminal laws of the State as ~~evidence of a crime, namely, any and all records contained within~~ any personal computer's hard drive and memory as well as all software which may have been used in connection with and to facilitate the above crimes is concealed in the residence of DANIEL

TESTERMAN and MISSY TESTERMAN located at Route 1, Box 136B, Washburn Street, Harrisville, WV 26362, being a one story, vinyl sided home, yellow in color, with attached garage and that the grounds for probable cause for the issuance of this warrant are as follows: That AMY WORKMAN received several obscene photographs by e-mail. She recognized the person depicted in said obscene photographs as being DANIEL TESTERMAN, that the name of the person whose affidavit has been taken in support of the issuance of this warrant is:

Chief Deputy M. D. Kelly
CHIEF DEPUTY M. D. KELLY

You are therefore, commanded in the name of the State of West Virginia to search forthwith the computer above described and all appurtenances appertaining thereto for the property above specified, to seize such property and bring the same before me to be dealt with according to law.

Given under my hand this the 27 day of August, 2003.

David W. Haugh
DAVID WAYNE HAUGH
MAGISTRATE

EXECUTED THIS 28th DAY OF August, 2003.

NOTE: W.Va. Code 562-1A-4 provides specifically that a warrant may be executed and returned only within 10 days after its date.

Michael D. Kelly

PROPERTY RECEIPT

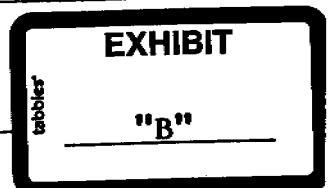
I, the undersigned, did execute the within warrant, on the 28th day of August, 2003.
 time: 10:15 hrs A.M. (P.M.), by searching the premises therein described.

The following is an inventory of the property seized, hereby received:

- 1- CPU unit & e machine SN @ AA09E0061191
- 1- EMC Systems monitor SN FRS4092644704 Model # 772
- 1- Visioneer Scanner Model # 6200 SN 043A005413D1
- 1- E machine Keyboard SN K07124933
- 1- Epson Photo 875DC Printer SN CEP0024997
- 1- Radio Shack mouse SN 20011755
- 8- 3 1/2" diskettes
- 1- Concord DLA 2000 digital camera SN U1031913

Dated this 28th day of August, 2003.

Michael P. Kelly
 (Officer)



Receipt of a copy of the within warrant is hereby acknowledged along with the inventory of the property taken as above listed.

Dated this 28 day of August

time: A.M./P.M.
Melissa J. Sexton
 (Person from whose premises the property was taken) 5

AFFIDAVIT AND COMPLAINT FOR SEARCH WARRANT

STATE OF WEST VIRGINIA,
COUNTY OF RITCHIE, TO-WIT:

This day personally appeared before the undersigned, a Magistrate for said County, CHIEF DEPUTY M. D. KELLY, who, after being first duly sworn, upon his oath says:

That between December ___, 2002, and August 20, 2003, and prior to the making of this Complaint, in the said County of Ritchie, DANIEL TESTERMAN, did unlawfully and feloniously engage in sexual contact and sexual intrusion with A.D.W. while she was under his care, custody or control in violation of WV Code 61-8D-5(a), and that the affiant has cause to believe and does believe that property, kept, concealed, which is and has been used in violation of the criminal laws of the State as evidence of a crime, namely, any and all internal records contained within the hard drive and memory as well as all software of that certain emachine etower 600is personal computer Serial Number: QAA09E0061191 relating to children engaged in sexual activity or any other crime and that the facts for such belief are that after obtaining a Search Warrant to search for the photographs e-mailed to Amy Workman, the said Amy Workman identified her three year old daughter, A. D. W., as one of the images depicted on the computer engaged in sexual activity with an adult male.

Chief Deputy M. D. Kelly
CHIEF DEPUTY M. D. KELLY
COMPLAINANT

Taken, subscribed and sworn to before me this the 27th day of August, 2003.

James P. Harper
MAGISTRATE

NOTE:

WVa Code 62-1A-4 provides specifically that a warrant may be executed and returned only within 10 days after its date.

EXHIBIT

"C"

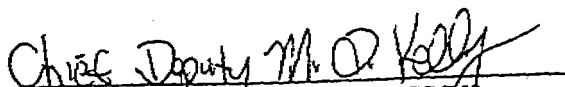
SEARCH WARRANT

STATE OF WEST VIRGINIA,

COUNTY OF RITCHIE, TO-WIT:

TO THE SHERIFF OR ANY DEPUTY SHERIFF OF THE COUNTY, TO ANY MEMBER OF THE DEPARTMENT OF PUBLIC SAFETY, OR TO ANY POLICE OFFICER AUTHORIZED BY LAW TO EXECUTE SEARCH WARRANTS.

Whereas, CHIEF DEPUTY M. D. KELLY, has this day made complaint on oath before the undersigned, Magistrate of Ritchie County, West Virginia, that between December ____, 2002, and August 20, 2003, and prior to the issuance of this warrant, in the said County of Ritchie, DANIEL TESTERMAN, did unlawfully and feloniously engage in sexual contact and sexual intrusion with A.D.W. while she was under his care, custody or control in violation of WV Code 61-8D-5(a), and that the affiant has cause to believe and does believe that property, kept, concealed, which is and has been used in violation of the criminal laws of the State as evidence of a crime, namely, any and all internal records contained within the hard drive and memory as well as all software of that certain emachine etower 600is personal computer Serial Number: QAA09E0061191 relating to children engaged in sexual activity or any other crime and that the grounds for probable cause for the issuance of this warrant are as follows: That after obtaining a Search Warrant to search for the photographs e-mailed to Amy Workman, the said Amy Workman identified her three year old daughter, A. D. W., as one of the images depicted on the computer engaged in sexual activity with an adult male, that the name of the person whose affidavit has been taken in support of the issuance of this warrant is:


CHIEF DEPUTY M. D. KELLY

You are therefore, commanded in the name of the State of West Virginia to search forthwith the computer above described and all appurtenances appertaining thereto for the property above specified, to seize such property and bring the same before me to be dealt with according to law.

Given under my hand this the 27th day of August, 2003.

James L. Harper
MAGISTRATE

EXECUTED THIS 29th DAY OF August, 2003.

Michael D. Kelly

NOTE:

WVa Code 62-1A-4 provides specifically that a warrant may be executed and returned only within 10 days after its date.

PROPERTY RECEIPT

I, the undersigned, did execute the within warrant, on the 29th day of August, 2003,
 time: 1535 ~~hrs~~ hrs A.M. (P.M.), by searching the premises therein described.

The following is an inventory of the property seized, hereby receipted:

1 - C machine tower SN: QAA00E0006191 hard drive

EXHIBIT

"D"

Dated this 29th day of August, 2003.

Michael D. Kelly
 (Officer)

Receipt of a copy of the within warrant is hereby acknowledged along with the inventory of the property taken as above listed.

Dated this the 29 day of August

, time: A.M. (P.M.)
Melissa J. Gisterman
 (Person from whose premises the property was taken)

SEARCH WARRANT

STATE OF WEST VIRGINIA,
COUNTY OF RITCHIE, TO-WIT:

TO THE SHERIFF OR ANY DEPUTY SHERIFF OF THE COUNTY, TO
ANY MEMBER OF THE DEPARTMENT OF PUBLIC SAFETY, OR TO ANY
POLICE OFFICER AUTHORIZED BY LAW TO EXECUTE SEARCH
WARRANTS.

Whereas, CHIEF DEPUTY M. D. KELLY, has this day made
complaint on oath before the undersigned, Magistrate of
Ritchie County, West Virginia, that between December ____,
2002, and August 20, 2003, and prior to the issuance of
this warrant, in the said County of Ritchie, DANIEL
TESTERMAN, did unlawfully and feloniously engage in sexual
contact and sexual intrusion with A.D.W. while she was
under his care, custody or control in violation of WVa Code
61-8D-5(a), and that the affiant has cause to believe and
does believe that property, kept, concealed, which is and
has been used in violation of the criminal laws of the
State as evidence of a crime, namely, that certain bedding
light in color with tan or yellow cartoon animals, believed
to be a lion, which may have been used in connection with
and to facilitate the above crime is concealed in the
residence of DANIEL TESTERMAN and MISSY TESTERMAN located
at Route 1, Box 136B, Washburn Street, Harrisville, Ritchie
County, WV 26362, being a one story, vinyl sided home,
yellow in color, with attached garage and that the grounds
for probable cause for the issuance of this warrant are as
follows: That after obtaining a Search Warrant to search
for the photographs e-mailed to Amy Workman, the said Amy
Workman identified her three year old daughter, A. D. W.,
as one of the images depicted on the computer engaged in
sexual activity with an adult male, that the name of the
person whose affidavit has been taken in support of the
issuance of this warrant is:


Chief Deputy M. D. Kelly
CHIEF DEPUTY M. D. KELLY

EXHIBIT

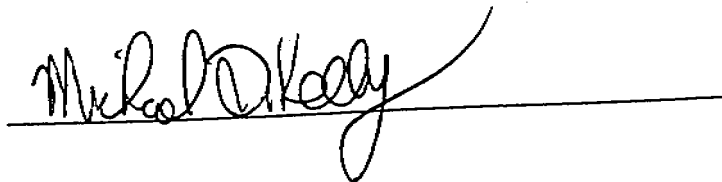
"E"

You are therefore, commanded in the name of the State of West Virginia to search forthwith the computer above described and all appurtenances appertaining thereto for the property above specified, to seize such property and bring the same before me to be dealt with according to law.

Given under my hand this the 27th day of August, 2003.


MAGISTRATE

EXECUTED THIS 29th DAY OF August, 2003.



NOTE:

WVa Code 62-1A-4 provides specifically that a warrant may be executed and returned only within 10 days after its date.

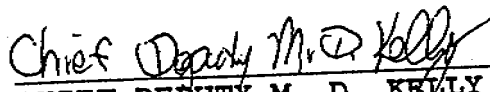
SEARCH WARRANT

 COPY

STATE OF WEST VIRGINIA,
COUNTY OF RITCHIE, TO-WIT:


TO THE SHERIFF OR ANY DEPUTY SHERIFF OF THE COUNTY, TO
ANY MEMBER OF THE DEPARTMENT OF PUBLIC SAFETY, OR TO ANY
POLICE OFFICER AUTHORIZED BY LAW TO EXECUTE SEARCH
WARRANTS.

Whereas, CHIEF DEPUTY M. D. KELLY, has this day made
complaint on oath before the undersigned, Magistrate of
Ritchie County, West Virginia, that between December ____,
2002, and August 20, 2003, and prior to the issuance of
this warrant, in the said County of Ritchie, DANIEL
TESTERMAN, did unlawfully and feloniously engage in sexual
contact and sexual intrusion with A.D.W. while she was
under his care, custody or control in violation of WV Code
61-8D-5(a), and that the affiant has cause to believe and
does believe that property, kept, concealed, which is and
has been used in violation of the criminal laws of the
State as evidence of a crime, namely, that certain bedding
light in color with tan or yellow cartoon animals, believed
to be a lion, which may have been used in connection with
and to facilitate the above crime is concealed in the
residence of DANIEL TESTERMAN and MISSY TESTERMAN located
at Route 1, Box 136B, Washburn Street, Harrisville, Ritchie
County, WV 26362, being a one story, vinyl sided home,
yellow in color, with attached garage and that the grounds
for probable cause for the issuance of this warrant are as
follows: That after obtaining a Search Warrant to search
for the photographs e-mailed to Amy Workman, the said Amy
Workman identified her three year old daughter, A. D. W.,
as one of the images depicted on the computer engaged in
sexual activity with an adult male, that the name of the
person whose affidavit has been taken in support of the
issuance of this warrant is:


CHIEF DEPUTY M. D. KELLY

You are therefore, commanded in the name of the State of West Virginia to search forthwith the computer above described and all appurtenances appertaining thereto for the property above specified, to seize such property and bring the same before me to be dealt with according to law.

Given under my hand this the 27th day of August, 2003.


MAGISTRATE

EXECUTED THIS _____ DAY OF _____, 2003.

NOTE:

WVa Code 62-1A-4 provides specifically that a warrant may be executed and returned only within 10 days after its date.

PROPERTY RECEIPT

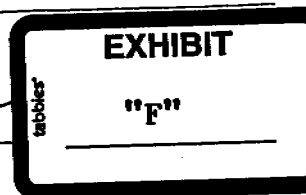
I, the undersigned, did execute the within warrant, on the 29th day of August, 2003,
 time: 1525 hrs A.M.-P.M., by searching the premises therein described.

The following is an inventory of the property seized, hereby receipted:

1- light colored quilt with flower print

Dated this 29th day of August, 2003.

Michael D. Kelly
 (Officer)



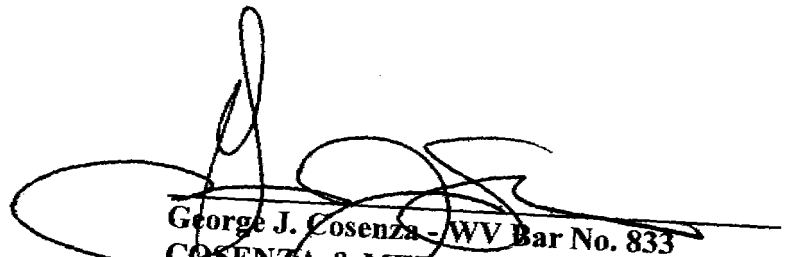
Receipt of a copy of the within warrant is hereby acknowledged along with the inventory of the property taken as above listed.

Dated this the 29 day of August, time: A.M.-P.M.

Melissa L. Gosterman
 (Person from whose premises the property was taken)

CERTIFICATE OF SERVICE

The undersigned counsel for Defendant, **DANIEL WILSON TESTERMAN**, hereby certifies that he served the foregoing **MOTION TO SUPPRESS and MEMORANDUM OF LAW** upon the Plaintiff, **UNITED STATES OF AMERICA**, by depositing a true copy thereof in the United States mail, postage prepaid, addressed to Thomas E. Johnston, United States Attorney, Clarksburg Federal Center, 320 West Pike Street, Suite 300, Clarksburg, West Virginia, 26301-2710 on this 4 day of February, 2005.



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